Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-611

WILLIAM H. FAIRBANKS, *Petitioner*

v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, William H. Fairbanks, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on 7 September 1976. Rehearing was denied by the said Court of Appeals on 6 October 1976. Stay of the mandate was granted on 19 October 1976, upon a showing that the instant petition for a writ of certiorari is not frivolous.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on 7 September 1976. A petition for rehearing was timely filed on 21 September 1976. Rehearing was denied by the Court of Appeals on 6 October 1976. This Court's jurisdiction is invoked under 28 U.S. Code § 1254.

QUESTIONS PRESENTED

Two questions are presented by the instant petition:

1. Does the Sixth Amendment of the Bill of Rights countenance denying a professional accused of felony — and more importantly a citizen of America on trial before his peers — of his right to cross-examine prosecution witnesses in a § 1014 case concerning customary practices in construction loans, concerning the personal interests of the officers of the savings and loan association allegedly "influenced", and concerning the complicity in the scheme of those very officers and witnesses?

2. More specifically, did Congress intend "purpose of influencing" to be an element of 18 U.S. Code § 1014, or are those words mere meaningless verbiage?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . ,upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

Petitioner William Fairbanks, an architect, was convicted of having made false statements "for the purpose of influencing" the actions of a savings and loan association in violation of 18 U.S. Code § 1014, and of the related conspiracy and aiding and abetting charges. The evidence showed that, at the request of his employers, Mr. Fairbanks submitted inflated invoices to his employers for his architectural services. His employers, in turn, used the inflated invoices to obtain construction financing.

It is undisputed that Fairbanks made no representations directly to the savings and loan association; that the inflated disbursements were used and controlled solely by the developers; that Fairbanks gained nothing from the inflated invoices. It is equally undisputed that Fairbanks did not receive more money than he was entitled to, and that his invoices (even as inflated) were reasonable for his services.

At his trial, the district court excluded evidence of the knowledge and complicity of the officials of the savings and loan association in the scheme. On cross-examination

of the prosecution's witnesses, Fairbanks attempted to elicit testimony concerning usual practices in the construction and construction loan industries, and concerning the personal interests of certain officers of the savings and loan association involved in the case, to show that persons in control of the savings and loan association were aware of the developers' inflated disbursement scheme, acquiesced and participated in it, and profited from it. The government's objections to such testimony, on grounds of irrelevance, were sustained by the district court. (Testimony of Roger Lane, Transcript Vol. I, p. 25; Testimony of Robert T. Irwin, Transcript Vol. I, pp. 80, 82.)

It is petitioner's position that the "purpose of influencing" element of 28 U.S. Code § 1014 is negated by the actual knowledge and participation of savings and loan officials in the scheme, and that the distinguished district court's refusal to permit the jury to hear of that participation was a grievous error of law and a shocking injustice.

REASONS FOR GRANTING THE WRIT

This is another business fraud case. This time, the government has branded as a felon an architect who, it is undisputed, received no more money than he was entitled to, who gained nothing from the scheme of his employers, and whose invoices (even as inflated) were entirely reasonable for his services. This travesty occurred because the defendant was denied the right to show the complicity in the scheme of the officials of the savings and loan association allegedly "influenced."

In *Kovens* v. *United States*, 338 F.2d 611 (5th Cir. 1965), the court stated that "the purpose of Section 1014 is to protect authorized functions of specified institutions from 'deceptive practices,' [citations omitted]." Thus, the intent

to influence and deceive, and guilty knowledge of the likelihood of such influence and deception, are primary ingredients of the government's case. *United States* v. *Simons*, 503 F.2d 831 (5th Cir. 1974). *Also see Reass* v. *United States*, 99 F.2d 752 (4th Cir. 1938).

The case of *United States* v. *Kramer*, 500 F.2d 1185 (10th Cir. 1974), was decided by a distinguished panel that included Judge Moore of the Second Circuit sitting by special designation. That case is squarely in petitioner's favor. It says:

> Finally, sufficient evidence does not exist by which a jury could find that the financial statement was submitted to the bank for the purpose of influencing the loan. A financial statement was not necessary, as a current one already was on file with the bank. And Kramer, as the bank's president, has unrestricted authority to make loans up to the bank's maximum lending limit. Under these circumstances a false financial statement could serve no useful or influencing purpose. Kramer and the person approving the loan would be one and the same.

The government, however, argues that the statement served to influence the bank's board of directors. We cannot agree. The evidence discloses that the board members did not review, and were not directly authorized to review, the financial statement. They approved the Fuller loan based on their faith in Kramer and his assertions about the loan. More important, however, is the fact that the loan was made and its proceeds placed in the bank's stock escrow account on August 23, 1971. It already had been obtained by the time the board of directors could vote on it. Their subsequent approval of the loan appears to have been little more than a mere formality.

United States v. Kramer, 500 F.2d 1185 (10th Cir. 1974).

The decision in *Kramer* is sensible. The weight of authority, however, is to the contrary. *United State* v. *Braverman*, 522 F.2d 218 (7th Cir. 1975); *United States* v. *Sabatino*, 485 F.2d 540 (2nd Cir. 1973); *United States* v. *Goberman*, 458 F.2d 226 (3d Cir. 1972); *United States* v. *Niro*, 338 F.2d 439 (2d Cir. 1964). The majority of the courts of appeals have gradually emasculated the "purpose of influencing" requirement of § 1014. The time is right for this honorable Court to restore to the courts below the element that is so clear in the statutory language.

The decision of the Tenth Circuit in the case at bar conflicts with the earlier decision of the Tenth Circuit in the *Kramer* case, decided by a different panel that included Judge Moore of the Second Circuit sitting by special designation. Conceding that a conflict between decisions of the same court of appeals ordinarily is not a basis for granting a writ of certiorari, nonetheless where there is only a superficial basis for "distinguishing" two conflicting cases from one court of appeals [in the situation at bar, the decision in *United States* v. *Kramer*, 500 F.2d 1185 (10th Cir. 1974) as against the decision in the instant case], the two cases may be said to present an intracircuit conflict between different panels of the same court. In such a situation, this Court has on occasion granted the precious writ. *John Hancock Ins. Co.* v. *Bartels*, 308 U.S. 180 (1939); *Maggio* v. *Zeitz*, 333 U.S. 56 (1948); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1949).

Until the instant decision, there was indeed a split of authority between the circuits: *Kramer* standing in direct opposition to *Braverman*, *Sabatino*, *Goberman* and *Niro*.

That conflict should not now be put to rest without any opportunity for review of the matter by the high Court. The statutory language seems sufficiently clear, and the logic of *Kramer* sufficiently cogent, to warrant review of the instant decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM H. FAIRBANKS,
Defendant-Appellant.

No. 75-1432

(75-CR-27)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Michael A. Williams for Appellant.

James P. Gatlin, Assistant United States Attorney (James L. Treece, United States Attorney, on the brief) for Appellee.

Before LEWIS, Chief Judge: SETH and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

Defendant Fairbanks was found guilty of having made false statements "for the purpose of influencing" the actions of a savings and loan association insured by the Federal Savings and Loan Insurance Corporation in violation of 18 U.S.C. §§ 1014, 2, 371. The issue on appeal is whether one's knowledge of the complicity of employees and officers of a federally-insured savings and loan association in a scheme of inflated construction loan disbursements indicates that he does not have the requisite intent to make false statements for the "purpose of influencing" the disbursement decisions of said savings and loan association in violation of section 1014. If so, the defendant argues that the trial court erroneously excluded evidence of such a complicity in the instant case.

Robert T. Irwin and Ray M. Bone, both Colorado Springs real estate developers, were involved in a multi-million dollar shopping center project. On May 1, 1973, Irwin and Bone entered into an owner-architect agreement with the defendant Fairbanks, a Colorado Springs architect. The architect's fees in this agreement amounted to $59,526. Sometime subsequent to the execution of the first agreement, Irwin and the defendant Fairbanks executed an identical owner-architect agreement, except the fees in the second agreement were inflated by 100 percent. Irwin testified that the purpose behind the second agreement was to allow them to prepare inflated draw requests and use the excess loan disbursals on other developments.

Irwin and Bone borrowed $3,400,000 from Security Savings and Loan Association in Colorado Springs for the shopping center project. The loan funds were placed in a special account and were to be disbursed during the course of the construction project as costs arose. Irwin and Bone were to submit loan disbursement requests, containing an itemization of costs incurred and the payee, plus documentation supporting the costs, usually submitted in the form of invoices from the subcontractors and suppliers. Security Savings' construction loan department would then compare the disbursement requests with a cost breakdown of the project, would sometimes conduct a field inspection, and would examine the invoices before approving the disbursal.

Evidence indicated that at the request of Irwin and Bone, Fairbanks would submit inflated invoices for his architectural services to Irwin and Bone. The developers would then prepare a loan disbursement request, append a copy of Fairbanks' inflated invoice, together with a copy of a check payable to Fairbanks in the amount of the in voice, and submit the request to Security Savings. After approval of the disbursement request, Security Savings would send Irwin and Bone a check for the total amount. Then, having written void on the original check made payable to Fairbanks, Irwin and Bone would give Fairbanks another check for the sum actually owing instead of the inflated sum. During the course of the construction, Security Savings changed this process somewhat requiring Irwin and Bone to submit their original checks payable to the suppliers with the disbursement request and the invoices. After Security Savings approved the disbursement request, it would send Irwin and Bone's original check directly to the suppliers, in this case Fairbanks. When this was done, either Fairbanks would bring the original check to Irwin and Bone and exchange it for a check in the amount actually owing or someone would exchange the checks at Fairbanks' office.

Although it was established that Fairbanks did not receive more money than he was entitled to, his participation in the scheme seemed to be in consideration for prospective architectural work on other development projects. Fairbanks' own testimony before the grand jury indicated that

he knew the purpose and use of his inflated invoices and voluntarily participated in the scheme.

Fairbanks' contention on appeal is that his knowledge of the complicity of several of the officers of Security Savings in the scheme of inflated loan disbursements somehow prevented him from having the "purpose of influencing" the actions of Security Savings necessary for a conviction under 18 U.S.C. § 1014 and that the court erred in excluding evidence of this complicity. In support of this position, Fairbanks relies on our decision in United States v. Kramer, 10 Cir., 500 F2 1185, wherein we held the evidence insufficient to convict a bank president "of aiding, abetting, inducing and procuring" a false financial statement from a customer for the purpose of influencing the actions of a federally-insured bank in violation of 18 U.S.C. § 1014. *Kramer*, a case limited by the peculiarity of its facts, involved a financial statement, false in substance but not proven by the Government to be known to be false by the defendant nor in any way a limitation on the defendant president's unrestricted authority to grant the loan. The loan was not one subject to review by the board of directors, was not reviewed before it was granted, and the board's subsequent approval was merely perfunctory in nature. *Kramer* involved a single bank officer with complete discretion over the issuance of a loan, who was allegedly "influenced" by a false financial statement that he had "induced" a third party to make. Our holding in *Kramer* is simply that the defendant there was not influenced by his own actions within the meaning of the penal statute. Such is not the case at bar.

In this case there is some indication of possible complicity and self-dealing by several, but not all, employees of Security Savings responsible for processing the loan and loan disbursements. For example, Raymond C. Rennerberger, the son-in-law of the president of Security Savings, was an undisclosed partner in the shopping center project. Also, Mike Hinton, Security Savings' loan officer for this particular loan, was involved in several joint ventures with Irwin and Bone. Irwin testified that some of the diverted funds were used on the projects in which Hinton was participating.

Several cases have held that some knowledge and complicity on the part of bank officers or employees is not enough to avoid conviction under 18 U.S.C. § 1014 for having made false statements to a federally-insured bank "for the purpose of influencing" some action of the bank. United States v. Braverman, 7 Cir., 522 F2 218, *cert. denied*, 423 U.S. 985; United States v. Tokoph, 10 Cir., 514 F2 597; United States v. Niro, 2 Cir., 338 F2 439. Typical of these cases is *Niro*, where the defendants argued that since the president of the savings and loan institution had participated in the fraudulent scheme, their false statements could not have been made "for the purpose of influencing" any action of the savings and loan. The court, however, concluded otherwise, stating:

> The words "for the purpose of influencing" were included in the statute to define the quality of the required intent, not to immunize a party from criminal liability because an officer of the bank was involved in the fraudulent scheme.

United States v. Niro, *supra*, at 441.

As we have indicated, the financial statement in *Kramer* was not used to influence the approval of the loan by the board of directors, since the board's approval was made after the fact and was "little more than a mere formality." *Id* at 1188. The fraudulent schemes in the other

cases, and here, needed more than merely the approval of the bank officer participating in the scheme. For example, in *Niro*, even though the president of the association was participating in the fraudulent scheme, the loan not only needed his approval, but also the approval of the board of directors, who knew nothing of the false statement. In the instant case, Hinton, the loan officer in charge of Irwin and Bone's construction loan, apparently was aware of the inflated disbursement requests. Also, the president of Security Savings, Connover, may have been aware of the scheme. But even if the complicity of Hinton and Connover were clearly established, this alone would not be enough to bring this case within our holding in *Kramer*. Here, unlike *Kramer*, there were other employees who participated in the loan and the loan disbursals who were totally unaware of the inflated invoices and disbursement requests. Roger Lane, the executive vice-president of Security Savings and a member of the loan committee that granted approval for the $3,400,000 loan, testified that he was unaware of the inflated loan disbursement requests. Likewise, George Organ, a loan disbursing officer in Security Savings' construction loan department, stated that he had no reason to doubt the validity of the Fairbanks' invoices that accompanied the loan disbursement requests and relied on them in making disbursements. Thus, in spite of Fairbanks' apparent knowledge of the possible complicity of several of the officers of Security Savings in the scheme of inflated loan disbursals, the complicity was not sufficient to prevent the jury from finding that Fairbanks had the "purpose of influencing" the actions of Security Savings required for conviction under 18 U.S.C. § 1014.

Finally, there is no indication at all that the trial court excluded any evidence pertaining to the alleged complicity of employees and officers of Security Savings. Defense counsel was permitted on several occasions to ask questions

concerning the complicity. In fact, the court permitted the defense to call both Hinton and Connover as witnesses and in no way circumscribed the defense's examination of these witnesses.

The judgment is affirmed.

APPENDIX B

SEPTEMBER TERM — October 6, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Oliver Seth and
The Honorable James E. Barrett, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. 75-1432

WILLIAM H. FAIRBANKS,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS
Clerk

By_____
LINDA O. HALL
Deputy Clerk

APPENDIX C

SEPTEMBER TERM — October 19, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Oliver Seth and
The Honorable James E. Barrett, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. No. 75-1432

WILLIAM H. FAIRBANKS,
Defendant-Appellant.

This matter comes on for consideration of appellant's motion to substitute privately retained counsel. The Court also has for consideration appellant's motion for stay of mandate.

Upon consideration whereof, it is ordered that Maurice R. Franks is substituted as privately retained counsel for appellant in place of Michael A. Williams, court-appointed attorney, who is excused from further duty with the Court's appreciation for his services.

It is further ordered that the mandate shall be stayed until November 19, 1976, pending certiorari; and that if on

or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS
Clerk

By _____
LINDA O. HALL
Deputy Clerk